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SUMMARY NOTES - Next Generation Regulatory Framework – Virginia*

Thursday, April 11, 2013, 8:30 – 10: 15 am

What are three most pressing environmental problems, impediments to addressing the problem, and recommendations?

Moderator – Tim Hayes, retired, Hunton & Williams LLP

Brooks Smith, Hunton & Williams LLP

1. **Interstate environmental issues**
   These are environmental issues that no one state can solve. The current statutory regime leads to conflict, pitting stakeholders into adversarial positions. It is incumbent on the EPA to serve as the facilitator of solutions.

2. **Imperfect intersections between our environmental laws**
   For example, we are using TMDLs under the Clean Water Act/State Water Control Law to address mercury where the predominant sources of impairment are airborne and often out-of-state if not out-of-country. Mercury is in the water and gets into fish but it is coming from the air, not localized, and could be international.
   a. TMDL does identify where the problem comes from but CWA has no authority to compel further air emission reductions—hands tied
   b. Point sources which are a small source of the problem get blamed because they are the only ones that can be regulated
   c. Some states have implemented state-wide TMDLs
   d. Need to be more collaborative and creative

3. **Landscape-based problems**
   The statutes are point source driven and don't help address current water quality issues, which are pollution caused by water interacting with the land. Congress didn't confer authority to regulate land use.

Kay Slaughter, retired Mayor of Charlottesville, VA

1. **"The Tragedy of the Commons"**
   A dilemma explored by Garrett Hardin in 1968 in *Science* whereby left to our own devices people will use whatever resources available to them for their own purposes and the commons gets

destroyed. To prevent this from happening, we need to have several options: persuasion, regulations, and incentives. Regulations are vital.

2. **Climate Change**
   There is a lack of political will to address the problem in our country at the national level. Recommendations for solving the issue: 1) adoption of a Federal carbon tax; 2) short of that, Cap N Trade which has been demonstrated to work under the Clean Air Act by the acid rain example; 3) state policy to encourage energy efficiency, including allowing cost-recovery for energy efficiency by the utilities through the SCC; 4)tools for coastal cities to deal with sea level rise.

3. **Clean Water**
   We need tools to address surface waters, ground water, and oceans. We need to encourage trading programs and a combination of regulations and incentives through the CWA for surface waters. Perhaps Virginia can target money from the farm bill to address NPS in egregious areas. Groundwater and oceans are not addressed by the CWA. We must address these.

The Honorable Matt Lohr, Commissioner of Agriculture and Consumer Services

1. **Agriculture is the backbone of society**
   It is the largest industry in Virginia. We don't want to put farmers out of business, that doesn't serve anyone.

2. **Collaboration and Balance**
   Farmers and environmentalists have the same goals; however they are not always on the same page. We need a balance among regulations and voluntary initiatives. The Ag Stewardship program is complaint-driven; however we have three staff for 95 counties. Safe harbor bills (Ag- Certainty), voluntary BMP improvements in exchange for protection from future regulations, are very positive.

3. **Funding**
   Farmers will want to implement changes if they receive funding/cost-share.

Mary Ann Saunders, Assistant City Manager, City of Chesapeake, Virginia

1. **Frame the issues for the public**
   The public is struggling to understand and accept the cost of environmental improvements. We need to do a better job of translating and selling it to the public, very difficult to explain the problem. Once you get beyond public safety, people don't want to pay and don't think it's the city's job. However, environmental improvements often lead to economic benefits. People are willing to pay for drinking water but stormwater fees outrage people.

2. **Political will**
   Politicians are elected by the public, so educating politicians themselves is important so that they can explain environmental issues to the public.

3. **Collaboration across levels of gov't. and agencies**
   We do our best interagency work during emergency situations. We need to figure out how to translate this cooperation and collaboration on environmental issues that are not emergencies but are important.

Moderator Questions

1. **Sometimes when fed programs didn't work states have had to come up to plate. What would you have Virginia pass?**
   - KS: legislation to require utilities to implement energy efficiency
   - BMS: tools unique to VA already on the books and the failure is that they aren't implemented
     - surface water management statute is not used because people disagree and don't have the will;
     - TMDLs are great tool but there is no teeth, no federal implementation in the CWA
   - MAS: prioritization of what to work on first and funding on the front end; jurisdictions need clarity, funding, and tools
   - ML: agriculture needs more money, everything is tied to funding, helping farmers pay for implementation, stewardship needs more man power, best management practice side

2. **If we had all the money how could these work better given archaic taxing in VA?**
   - KS: maybe there are ways to bring in NPS and farmers to be more involved using purchase development rights as a more permanent solution, combine local and state funds to get permanent protections, focus on watersheds
   - ML: more dedication to conservation easements, etc., tax structure—it is outdated, property funding most of revenue and most in agriculture, proposals to reform never get traction in gov, always comes with tax increase, hard to sell to public, reducing in one area and raising in another—elected officials can't do this and get reelected
   - BMS: borrow from land preservation program, land and water protection have public support, create favorable tax program to incentivize land protection, most owned by farmers who may not get full benefit so they allowed them to get tax in hand—successful. Use taxing tool rather than just paying for reforms, could be done with water

Questions from audience

1. **Richmond 5 mi concrete channel TMDLs, collect rainwater and treat. Is that what we really want? How about day-lighting and making the river accessible to the public?**

   - Fed and state have experimented with green ideas but it is not a perfect fit. In TMDL world you have a mandate and regulated party takes that seriously, you have to defend your choice, may not be environmentally proactive or long term but you can show compliance. To inspire more progressive thinking you need safe harbors so people are more open to experimentation. (BMS)

2. **What's the ultimate goal? Water is fishable and swimmable - goals of CWA? Are all waters to be treated the same way? Should we sacrifice some to focus on others?**
   - One size fits all tools and standards don't work—rethink fundamentals (EPA Ephram). Some problems aren't fixable or will take forever to resolve. Making standards and TMDL goals that are possible jams up the process. What if we made the CWA objectives an ultimate but started with smaller steps? Don't give up the goal but set more realistic compliance targets to lessen fighting and actually make progress.

   - There is a set amount of dollars and you have to make value decisions. Focus on most cost effective dollars, where can we actually make a difference and then turn back to others. A penny

in each stream won't make a difference—tools are already there, we just need to decide what we value.

3. **Comment:** We need to increase state funding to at least 2 cents/per dollar of the budget. Article 11 of the Virginia Constitution guarantees XX. If we believe in the Constitution should we fund to a level that gives the constitution meaning and power? Backing off on goals isn't a solution. We need to explain to the public in ways that they can understand. Cost of a coffee per day.

4. **Study on risk analysis**—laws and regulations focus on perceived risk vs. real risk. Money is often spent on areas that didn't have as much impact but a lot of attention.
    a. BMS: For risk-based decision-making you need basis in fact. An example is groundwater issues—we don't understand it and can't make good decisions without understanding. Some things you can't get to a safe level or can't get the information. You always improve decision-making with more knowledge but how do we get it?
    b. Comment: more to environmental protection than health
    c. Moderator: CERCLA spends huge amounts of money to clean up sites that had very little impact and could've just not been used. The money could've been spent more effectively, public perception of risk from media and advocacy groups.

5. **Comment:** I am concerned about the environment and public health. When we hear about getting rid of EPA and regulations. We don't need to dramatically change regulations but they need to be fine-tuned. We need the city to pay attention to country and vice versa.
    a. KS: Command and control has worked to some extent, but the complexity of the problems is such that some things can't be reached with those tools. How do we bring in things like NPS with more creative tools? We need more agencies working together; need interagency, inter-law actions.
    b. Comment: people like to talk about generations in environmental regulation. First was command and control. Second was aggregate and use economic tools like cap and trade. We may have a third - (Cass Sunstein, Simpler: The Future of Government, April 2013) information disclosure, make things comprehensible and encourage public to want them.

6. **Implementation about cleaning up Chesapeake Bay, EPA was very clear about there being solutions and getting there, but the intractable problem was manure. How do we deal with this issue?**
    a. ML: We have cracked down on manure for fertilization and its role in run off. The idea of converting waste to energy has been researched and the problem is that it currently not economically viable. Producing electricity isn't useful if electric company can't afford to buy it. We also have to consider air pollution from this process. There have been proposals on a much smaller scale, but the tech isn't there to do without a lot of government subsidies.

    b. **Comment:** College of William and Mary and Virginia Institute of Marine Science (VMIS) have formed the Virginia Coastal Policy Clinic which will look at science, policy, and law. September 2013 conference planned.

    c. **Moderator:** We still need the old school technology of command and control, but we need to update and find out how to capture externalities more efficiently.

7. **Comment**: Local officials are now put in the role of a partner in command and control programs—which is rarely popular. They need support to do their job effectively. The state could play an

important role in helping residents understand the nature of the environmental challenges and programs meant to address them. I am very concerned about public skepticism about science that is the basis of regulatory framework—need more education for WHY.

- MAS: We need to use new communications methods for reaching out to citizens. The City of Chesapeake has been using public access tv and internet to air council meetings. Even if it doesn't reach a lot of people, it really helps.

- Moderator: modern communication is a change since programs were first put into place; gets used more for backlash to environmental issues than for promotion—misinformation, rhetoric, skewed science; difficult to deal with issues when that starts to happen.

- KS: This is happening with water system at local level, use of social media to get opposition to environmental initiatives, including environmental advocates against other environmental advocates because of the amount of misinformation; hard to keep people on target with facts.

- BMS: in defense of regulators, it used to be you propose a regulation and get 30 comments and can be passed quickly. Now it elicits 3K comments. It is good to have power of the people but it is a massive burden on agencies to try to meaningfully synthesize responses which may be influenced by misinformation—leads to gridlock

- Comment: Burden of reviewing comments is essential to democracy and getting information. Number of comments not as significant. Usually only 10-20 substantive comments you actually have to sit down and think about. Easy procedural hoop. However, there are a number of hoops that are less defensible, like requirements to study things

- Attempts to deal with massive public comments as the passage of acts which eliminate/reduce APA requirements which while efficient isn't good. We need more comments; we don't want to institutionalize restriction of comments.

- KS: There is a battle every time there is environmental legislation. We do need public comment; part of explaining new regulations to give people a basis to comment, get message out in plain English.

- Smart cities initiatives; y and z generations will be the ones who gather and report on data; crowdsourcing and innovative ways to solve problems; be more proactive than just soliciting comments.

Session Reporter: Kathryn Humphrey, Washington & Lee University, School of Law, J.D. Candidate 2014

**Note: the views of the Environment Virginia Symposium panelists are those of the individuals who participated. They do not reflect the policies or positions of the Virginia Military Institute.*